United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

No. 76-7466

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P/S

IN THE

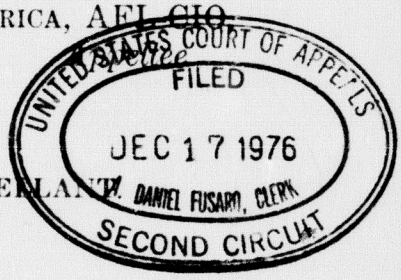
United States Court of Appeals

FOR THE SECOND CIRCUIT

MARRIOTT IN-FLITE SERVICES,
A DIVISION OF MARRIOTT CORPORATION,
Appellant

v.

LOCAL 504, AIR TRANSPORT DIVISION,
TRANSPORT WORKERS OF AMERICA, AFL-CIO,
Appellee



BRIEF FOR THE APPELLANT

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December 16, 1976

Mr. A. Daniel Fusaro
Clerk, United States Court of
Appeals for the Second Circuit
Foley Square
New York, New York 10007

Re: Marriott In-Flite Services v. Local 504,
Air Transport Division, Transport Workers
of America, AFL-CIO - No. 76-7466

Dear Mr. Fusaro:

A review of the printed brief submitted by the undersigned in the above matter revealed that Section 28(2) of the Court's rules was not complied with in that the name of the lower court judge and the citation of his opinion was not included as a preliminary statement.

The opinion of Judge Pratt, included in the Joint Appendix at Page 14, is found at 418 F. Supp 609. Would you see that the briefs filed by the Appellant are corrected to reflect this addition? Ten copies of this letter are enclosed, if it is decided that attaching this letter to the briefs would be the most expeditious way of making the addition.

Very truly yours,

Ivan H. Rich, Jr.
Assistant General Counsel

IHR/gg
Enclosures

cc: Andrew J. Wallace

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AUTHORITIES CITED

IN THE

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BRIEF FOR THE APPELLANT

I. STATEMENT OF ISSUE PRESENTED

Whether Transport Workers Local 504 is a labor organization subject to the secondary boycott prohibitions of the Labor Management Relations Act.

II. STATEMENT OF THE CASE

This is an appeal of the lower court's dismissal of Appellant's complaint because of an asserted lack of subject matter jurisdiction. Complaint was filed on September 13, 1973 in the Eastern District of New

York alleging that Local 504, Transport Workers of America, AFL-CIO (hereinafter "Local 504" or "the Union") engaged in unlawful secondary picketing of premises leased to Marriott, damaged the property and wrongfully interfered with Marriott's business relationships. (A. 2-10).[1] Local 504 denied most of the allegations of the complaint except it admitted it was a labor organization within the meaning of Section 2(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 151, *et seq.*, (hereinafter "the Act" or "LMRA"). (A. 11). Local 504 later recanted the admission in answers to interrogatories and Marriott does not contend that this initial "oversight" precluded it from later relying on the argument that it was not a labor organization.

The union moved for summary judgment on two grounds. First, that it is not a labor organization within the meaning of Section 2(5) of the Act and is therefore exempt from the Act's prohibitions. Second, assuming labor organization status *arguendo*, the secondary boycott provisions of the Act are not applicable because Marriott was not a "neutral" employer. The court below granted the union's motion solely on the basis of the first ground and did not consider the second. (A. 24). Marriott filed timely notice of appeal.

Although there are, of course, disputed material facts with respect to the picketing engaged in by Local 504 and Marriott's status as a "neutral", the decision of the court below is based on the undisputed facts regarding the union's membership and

[1] "A" references are to the pages of the Joint Appendix filed herein.

collective bargaining activities. These facts, and the facts of the dispute, are adequately set forth in the court's opinion. In short, KLM Royal Dutch Airlines (hereinafter "KLM") desired to terminate its own airline food preparation operation and subcontract the work to Marriott. KLM negotiated the matter to impasse with Local 504, the bargaining representative of its food service employees and a strike against KLM commenced on July 1, 1973 over this issue. The bargaining relationship between KLM and Local 504 was pursuant to the terms of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Although Marriott did not desire to utilize the existing KLM commissary building to prepare food for KLM, it leased the building to use as a commissary kitchen to serve its other airline customers. Local 504 continued to picket the building and it is this picketing, with attendant physical damage and physical denial of the building's use to Marriott, that gives rise to this litigation.

III. SUMMARY OF ARGUMENT

The necessarily detailed examination in the following section of the interplay between the Act's secondary boycott and definitional provisions cannot succinctly capture the glaring error in the analysis of the court below. The holding is so clearly erroneous that words are barely adequate to communicate its manifest frailty.

It is conceded by the court below that Congress intended to make unlawful the conduct engaged in by Local 504. Nevertheless, the court ignores the expressed intent of Congress in enacting the 1959

Amendments to the Act and concludes that the language enacted was inadequate to accomplish its purpose. Thus, in the view of the court below, the *protections* of the secondary boycott provisions were extended to all employers but their *prohibitions* were not extended to cover employees working for employers subject to the Railway Labor Act. (A. 21). It is a hollow protection indeed where the prohibitions giving rise to that protection are circumvented because of an asserted congressional inability to codify its intent.

The court below supports its conclusion by taking out of context dicta where the Supreme Court considered an entirely different question in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) (hereinafter "Jacksonville Terminal"). There the Court observed that the 1959 Amendments did not "expand the scope of 'employees' or 'labor organizations' whom the Act forbade to engage in [Secondary] conduct." Yet, the context of this language was in the Court's rejection of a union's argument that the LMRA pre-empted state court jurisdiction when all parties to the dispute were governed by the Railway Labor Act. The situation there was a "railway labor dispute, pure and simple" where none of the parties were subject to the LMRA.

The Court in *Jacksonville Terminal* specifically distinguished that case from the situation where one of the parties is subject to the LMRA by citing *Electrical Workers* v. *N.L.R.B.*, 350 F.2d 791 (D.C. Cir. 1965). 394 U.S. at 377. There the Labor Board and courts rejected the contention of Railway Labor Act unions that they were by definition exempt from the

secondary boycott provisions of LMRA when they engaged in otherwise prohibited secondary activity against LMRA employers in support of a strike against a Railroad. *International Brotherhood of Electrical Workers (B.B. McCormick & Sons, Inc.)*, 150 NLRB 363, 370, enfd. *per curiam* 350 F.2d 791 (D.C. Cir. 1965), cert. denied 383 U.S. 943 (1966). It is undisputed that Marriott is an LMRA employer not subject to the Railway Labor Act.

The Board relied on the *Electrical Workers* rationale in finding unlawful a voluntary secondary boycott agreement between a Railway Labor Act union and an airline purporting to achieve precisely what the union sought to achieve by picketing in the instant case. *Lufthansa German Airlines (International Association of Machinists)*, 197 NLRB 232 (1972), enfd. sub nom *Marriott Corporation* v. *N.L.R.B.*, 491 F.2d 367 (9th Cir. 1974), cert. denied 419 U.S. 881 (1975). There the Board considered it "clear beyond a peradventure" that the secondary boycott laws are violated if a union induces an airline's employees to strike to force the airline to cease doing business with Marriott. 197 NLRB at 237.

The court below attempts to circumvent the clear thrust of the Board's analysis in *Lufthansa* by playing a numbers game in which the Act's jurisdiction over a labor organization supposedly depends on the number of employees a union represents under the LMRA compared with the number represented under the Railway Labor Act. Yet, it is clear that if a union ". . . allows statutory 'employees' to participate, it becomes a labor organization entitled to the protections given such organizations and subject to the restrictions imposed by Section 8(b) on such or-

ganizations." *International Organization of Masters, Mates, and Pilots* v. *N.L.R.B.*, 486 F.2d 1271, 1274 (D.C. Cir. 1973). It is undisputed that approximately 1,000 of Local 504's 7600 participating members are subject to the LMRA. Unions are uniformly held to be labor organizations under the Act even though the number of LMRA "employees" represented is negligible and not even involved in the immediate dispute. *National Marine Engineers Beneficial Association* v. *N.L.R.B.*, 274 F.2d 167 (2nd Cir. 1960); *International Organization of Masters, Mates, and Pilots* v. *N.L.R.B.*, 351 F.2d 771 (D.C. Cir. 1965); *International Organization of Masters, Mates, and Pilots* v. *N.L.R.B.*, 486 F.2d 1271 (D.C. Cir. 1973).

The Board has in prior proceedings concluded that Local 504 is a labor organization within the meaning of LMRA. *Triangle Maintenance Corp.*, 194 NLRB 486 (1971); *Transport Workers, Local 504 (Triangle Maintenance Corp.)*, 186 NLRB 538 (1970). See also *Kaynard* v. *Transport Workers Union, Local 504*, 306 F. Supp. 344 (E.D.N.Y. 1969). In the two Board proceedings, it was Local 504 who was seeking to utilize the Act's jurisdiction to its advantage. The union cannot now have it both ways. It cannot invoke the Act's jurisdiction when its advantage is served yet deny that same jurisdiction when it is brought to book for unlawful secondary picketing.

IV. LOCAL 504 IS A LABOR ORGANIZATION SUBJECT TO THE SECONDARY BOYCOTT PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT

A. The Statutory Framework Was Designed to Prohibit the Conduct Engaged in by Local 504.

In 1959 Congress broadened the secondary boycott provisions of the Act. Before the amendments the secondary picketing provisions were found in Section 8(b)(4)(A) and read in relevant part:

> "It shall be an unfair labor practice for a labor organization . . . to engage in, or to induce or encourage the employees of any employer to engage in a strike . . . where an object thereof is forcing . . . any employer . . . to cease doing business with any other person."

The amendments changed the language dealing with the inducement of "employees of any employer" to the inducement of "any individual employed by any person". Accordingly, the amended language, now Section 8(b)(4) i ii (B), currently reads as follows:

> "It shall be an unfair labor practice for a labor organization . . . to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike . . . or (ii) to threaten coerce or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to . . . cease doing business with any other person . . ."[2]

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[2] The full text of current Section 8(b)(4)(B) makes it unlawful for a labor organization or its agents:

[Footnote continued on page 8]

The stated purpose of this Amendment was to "extend the [Secondary Boycott] ban to these [railroad employees] by use of the words 'any person' instead of the words 'employees of any employer' ".[3]

But the court below would nullify this expressed intent by observing that the introductory sentence of the prohibition continues to refer only to a "labor organization", and this term as defined in Section 2 (5) of the Act includes only "employees" who, pursuant to Section 2(3) of the Act excludes "any individual employed by any employer subject to the Rail-

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[2] [Continued]

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—. . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .".

[3] I Legislative History of LMRA 476; opinion of court below (A20).

way Labor Act". This interpretation, although a neat piece of statutory juggling, was squarely rejected by the Board in *Lufthansa German Airlines (International Association of Machinists)*, 197 NLRB 232 (1972), enfd. sub nom. *Marriott Corporation* v. *N.L.R.B.*, 491 F.2d 367 (9th Cir. 1974), cert. denied 419 U.S. 881 (1975) (hereinafter "Lufthansa").

In *Lufthansa* the airline agreed voluntarily to do precisely what the union's picketing sought to coerce KLM to do in the instant case: cease doing business with Marriott. Such agreements are unlawful pursuant to Section 8(e) of the Act, 29 U.S.C. § 158(e), which makes it an unfair labor practice "for any labor organization and any employer to enter into any contract or agreement . . . whereby such employer ceases or agrees to cease . . . doing business with any other person." The prohibited effect is exactly the same as that prohibited by Section 8(b)(4) i ii (B), the only difference being that Section 8(e) prohibits voluntary agreements accomplishing what picketing seeks to coerce under Section 8(b)(4).

The union's argument in *Lufthansa*, identical to the union's argument in the instant case, was that since Congress retained the term "labor organization" in Section 8(e), it was exempt from the reach of the statute. The argument was rejected by the Board on the basis that a union's picketing to obtain the same result as a Section 8(e) agreement was clearly violative of Section 8(b)(4)(B):

> "Machinists and Lufthansa contended that in amending the Act in 1959 to close loopholes in the secondary boycott provisions, Congress ex-

tended the Act's protection against secondary conduct to airlines but did not make various unfair labor practice prohibitions applicable to airlines or their employees. A 4 to 1 Board majority rejected this interpretation of legislative intent stating instead that Congress, in closing a multitude of secondary boycott provision loopholes, could not have intended that the Board create another loophole by reaching the result the Machinists and Lufthansa sought. Thus, the majority decided that the Machinists and Lufthansa violated the Act by entering into and giving effect to an agreement whereby Lufthansa agreed to cease business with Marriott In-Flite Services. Despite the use of the phrase "any employer," in section 8(e), rather than "any person" as used in section 8(b)(4)(B), the majority stated that Congress intended to enact in section 8(e) a ban on hot cargo agreements at least as encompassing as the ban envisaged by drafters of section 8(b)(4)(B). Otherwise, the conferees could not have determined that the language of section 8(e) was a duplication of the terminology contained in the proposed hot cargo amendment to section 8(b)(4)(B) which they deleted from the bill. *Furthermore, as noted by the majority, had the Machinists induced Lufthansa's employees to strike to force the company to cease business with Marriott, the union would have violated section 8(b)(4)(B). The majority reasoned it would be illogical to find unlawful a strike by the Machinists to force Lufthansa to cease business with Marriott under section 8(b)(4)(B)* while holding a contract executed by the parties designed to

achieve the identical result was not proscribed by section 8(e)." (emphasis added).[4]

It is important to emphasize that the Board's analysis of the Section 8(e) question with respect to the union began with the statement that it was "clear beyond peradventure . . . that had IAM induced Lufthansa's employees to strike or engage in concerted activity to force the company to cease doing business with Marriott, the union would have violated Section 8(b)(4)(B)." 197 NLRB at 237.

The fact that this lawsuit was brought under Section 303 of LMRA, 29 U.S.C. § 303, can make no difference in the above analysis since that Section merely confers original jurisdiction in the federal courts to hear lawsuits based on conduct violative of LMRA Section 8(b)(4). The alternative forum of the federal courts was utilized by Marriott, consistent with the purpose of Section 303, in order to obtain money damages rather than the slower and less effective cease and desist remedy available through the NLRB.

The court below did not bother to analyze the basis of the *Lufthansa* decision, but rather attempted to distinguish it on the ground that the membership of the union involved there was composed of 86% LMRA employees while Local 504's membership is composed of 86% Railway Labor Act employees. It is respectfully submitted that Congressional purpose cannot be frustrated by resorting to such a numbers game. It is appropriate to point out the admonition of the Supreme Court that courts should "concede

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[4] Thirty Seventh Annual Report of the National Labor Relations Board at 134 (1972).

that a union is a 'labor organization' for Section 8(b) purposes whenever a reasonably arguable case is made to this effect." *Engineers Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 182 (1962).

This Circuit and other courts have consistently held unions accountable for Section 8(b) conduct even when the unlawful activity was entirely on behalf of individuals outside the Act's Section 2(3) definition of "employee". In *National Marine Engineers Beneficial Association* v. *N.L.R.B.*, 274 F.2d 167 (2nd Cir. 1960) unions composed almost exclusively of supervisory personnel were charged with violating Section 8(b)(4). They defended on the ground that, like Railway Labor Act employees, their members were specifically excluded from the Section 2(3) definition of employees and, therefore, they could not be labor organizations under Section 2(5). This court rejected that argument:

> "We think that the determination whether a labor union charged with an unfair labor practice under section 8(b) is a "labor organization" turns on whether "employees participate" in the organization charged and that, if they do, the union is a "labor organization" although all the workers of the particular employer whom it is seeking to represent are "supervisors" and therefore not "employees."
>
> 274 F.2d at 173.

Local 504 cannot argue in this case that its conduct is excused because its picketing was on behalf of only those individuals outside the LMRA Section 2(3) definition of "employees". As this court stated in *Marine Engineers, supra*:

> "But the legislative history is far from being so definite or persuasive as to justify our reading the Act, in a manner opposed to its plain language, so as to permit a union in which "employees participate" to engage in acts branded as unfair labor practices by section 8(b) simply because the workers on whose behalf the union was acting are all supervisors."
>
> 274 F.2d at 173.

This holding was cited with approval in *Marine Engineers Association* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962) where the court noted:

> ". . . the Board's theory, subsequently adopted by the Court of Appeals for the Second Circuit, that the relevant unit of membership for determining what is a labor organization in a section 8(b) context is the entire union, and to the holding that the known membership of a few "employees", provisions in the union's constitution making membership available to "employees", and previous conduct indicative of "employee" representation were sufficient to render the national union a "labor organization".
>
> 370 U.S. at 183.

B. The Decision of the Supreme Court in Jacksonville Terminal Does Not Render Local 504 Immune From the Secondary Boycott Laws.

The court below would have it that the Supreme Court's 1969 decision in *Jacksonville Terminal* renders the preceding analysis inapplicable. The short answer to this assertion is that the Supreme Court denied certiorari in *Lufthansa* when the union there petitioned with exactly the same argument advanced here by Local 504. 419 U.S. 881 (1975). Moreover,

this court's analysis in *Marine Engineers* continues to be cited for the proposition that Section 8(b) conduct cannot be legitimized on the ground that the workers engaging in the unlawful conduct are not "employees" constituting a "labor organization" under Sections 2(3) and 2(5) of the Act. *Masters, Mates and Pilots* v. *N.L.R.B.*, 486 F.2d 1271 (D.C. Cir. 1973). See also, *Danielson* v. *International Organization of Masters, Mates and Pilots*, 521 F.2d 747 (2nd Cir. 1975).

The question in *Jacksonville Terminal* was whether a state could proscribe secondary picketing engaged in by Railway unions against neutral railroads and the terminal company in furtherance of their dispute with the Florida East Coast Railway (hereinafter FEC). All those involved, both employer and employee, were g[illegible]ed by the Railway Labor Act. The unions' picketing of the other railroad companies was enjoined in state court pursuant to Florida's law outlawing secondary boycotts. The union argued that the state courts had no jurisdiction because its conduct was under the exclusive jurisdiction of the National Labor Relations Board. In rejecting that argument, the Court merely held that it would make no sense for the Board to have primary jurisdiction over a dispute in no way affecting anyone under the LMRA. It was ". . . a railway labor dispute, pure and simple." 394 U.S. at 377.

Manifestly, the instant case is *not* a pure and simple railway labor dispute. Marriott, an LMRA employer, has been picketed and the most basic employment term of its LMRA employees—the opportunity to perform their work—was denied them. The case

of *International Brotherhood of Electrical Workers (B.B. McCormick & Sons, Inc.)*, 150 NLRB 363, 370, enfd. *per curiam* 350 F.2d 791 (D.C. Cir. 1965), cert. denied 383 U.S. 943 (1966) illustrates the critical distinction that when an LMRA employer is brought into an RLA dispute, the secondary boycott provisions of LMRA are available to protect him. The dispute in *Electrical Workers*, oddly enough, had its genesis in the same dispute considered by the Supreme Court in *Jacksonville Terminal*—the strike against Florida East Coast Railway.

In *Electrical Workers* various unions representing both Railway Labor Act and LMRA employees began picketing at employee entrances used by LMRA employees of independent contractors. The Board had no trouble concluding that the secondary boycott laws were violated:

> "There is no legislative history to support Respondents' contention that an international union which represents railroad and non-railroad employees is exempt from the provisions of Section 8(b)(4) when it engages in otherwise prohibited secondary activity against any person engaged in commerce within the meaning of the Act, in support of a strike against a railroad. As we have indicated above, both the Board and the courts have by clear implication decided to the contrary."
>
> 150 NLRB at 371.

Thus, the court below plainly ignored the thrust of *Lufthansa*, *supra* and *Electrical Workers*, *supra* while attaching a plainly erroneous interpretation to *Jacksonville Terminal*.

It is important to emphasize that Local 504 has subjected itself to—and indeed embraced—LMRA jurisdiction when it stood to benefit by the application of the Act. In *Triangle Maintenance Corp.*, 194 NLRB 486 (1971) Local 504 admitted its LMRA labor organization status in a proceeding where it sought to have the Board impose a bargaining obligation against an LMRA employer. See also, *Kaynard* v. *Transport Workers Union, Local 504*, 306 F. Supp. 344 (E.D.N.Y. 1969); *Transport Workers Union, Local 504*, 186 NLRB 538 (1970). In none of these proceedings did Local 504 argue that it was not a "labor organization" and in two of these cases labor organization status was specifically found by the Labor Board. It is respectfully submitted that the jurisdiction of the Act is not a chameleon-like proposition, to be invoked only when the union's purpose is served.

V. CONCLUSION

The judgment of the court below should be reversed and the case remanded for further proceedings.

Respectfully submitted,

IVAN H. RICH, JR., ESQ.
5161 River Road
Washington, D. C. 20016

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v.	)	No. 76-7466
LOCAL 504, AIR TRANSPORT DIVISION, Transport Workers of America, AFL-CIO, Appellee	)	

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Brief and one copy of the Joint Appendix has been served this 15th day of December, 1976, upon Andrew J. Wallace, Wallace and O'Haire, 129 Newbridge Road, Hicksville, New York 11801 by certified mail.

Ivan H. Rich, Jr.